STATE OF MICHIGAN

COURT OF APPEALS

JAMES BISHOP,

Plaintiff-Appellant,

v

NORTHWIND INVESTMENTS, INC.,

Defendant/Cross-Defendant,

and

BURGER KING CORPORATION,

Defendant/Cross-Plaintiff/Third-Party Plaintiff,

and

HYLER CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 16, 2004

No. 250083
Mackinac Circuit Court
LC No. 00-005183-NO

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

GRIFFIN, J. (*concurring in part and dissenting in part*).

I concur and join in the affirmance of the grant of summary disposition in favor of defendant Hyler Construction Company in regard to plaintiff's claim of negligence and the denial of the proposed amendment alleging breach of implied warranty. However, I respectfully dissent as to the reversal of the lower court's order denying plaintiff's motion to amend to assert a claim of public nuisance.

The law of nuisance has been described as "the great grab bag, the dust bin, of the law," *Awad v McColgan*, 357 Mich 386, 389; 98 NW2d 571 (1959), and "the great marshmallow of the law." *Yarrick v Village of Kent City (On Remand)*, 189 Mich App 627, 628; 473 NW2d 774 (1991). Nevertheless, the law of nuisance does have its parameters.

In *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 151-152; 422 NW2d 205 (1988) (opinion by Brickley, J.), overruled on other grounds *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), Justice Brickley delineated the types of common law nuisance that have been recognized in Michigan:

> There are two basic types of nuisance: public and private. They "have almost nothing in common, except that each causes inconvenience to someone . . . ." Prosser & Keeton [Torts (5th Ed), § 87], *supra*, p 618.
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> "A private nuisance is a civil wrong, based on a disturbance of rights in land." Prosser & Keeton, *supra*, p 618. A public nuisance is a "criminal offense, consisting of an interference with the rights of the community at large . . . ." *Id.* The Restatement defines public nuisance as "an unreasonable interference with a right common to the general public." 4 Restatement Torts, 2d, § 821B, p 87. Prosser & Keeton describe the overlap between public and private nuisance: When "the individual interest that the public nuisance is designed to protect is the type protected under tort law, then the conduct that is regarded as a public nuisance will quite often be regarded also as either a private nuisance or some other tort to those who are adversely affected." *Id.*, § 90, p 652.
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> Two additional categories are nuisance per se and nuisance in fact or "per accidens." This Court has explained that difference:
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> > "From the point of view of their nature, nuisances are sometimes classified as nuisances *per se* or at law, and nuisances *per accidens* or in fact. A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Nuisances in fact or *per accidens* are those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict injury on person or property. The number of nuisances *per se* is necessarily limited, and by far the greater number of nuisances are nuisances *per accidens*." [*Rosario* [*v City of Lansing*, 403 Mich 124; 268 NW2d 230 (1978)], *supra*, pp 132-133 (opinion of Fitzgerald, J.), quoting *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959).]
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> Nuisance in fact has been divided into two further subclasses of nuisance: intentional and negligent. *Gerzeski [v Dep't of State Highways*, 403 Mich 149; 268 NW2d 525 (1978)], *supra*, p 158. In *Dahl v Glover*, 344 Mich 639, 644; 75

> NW2d 11 (1956), the Court approved jury instructions that described nuisance per se as well as the two types of nuisance in fact. See also *Denny v Garavaglia*, 333 Mich 317, 331; 52 NW2d 521 (1952).

Plaintiff's proposed third amended complaint sought to bring a claim of "intentional nuisance and/or nuisance in fact" against defendant Hyler Construction Company for "constructing the roof valley above the doorway." The majority and I agree that plaintiff's proposed claim "sounds in public rather than private nuisance." However, my colleagues would apparently hold that a slip and fall accident caused by a public nuisance is not subject to the open and obvious defense. No authority is cited for this proposition. While the validity of this legal conclusion is in doubt, I need not decide the issue because plaintiff's proposed complaint lacks an essential element necessary to state a cause of action for public nuisance. In the present case, there is no dispute that at the time of plaintiff's slip and fall, defendant Hyler Construction Company neither controlled nor had a right to control the premises. Thus, it lacked the corresponding authority to abate the alleged public nuisance. On this basis, the lower court correctly denied the motion to amend the complaint because the amendment would be futile. MCR 2.116 (I)(5); *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997).[1]

It is well established that in order to allege a cause of action for public nuisance, the defendant must be in control of the alleged nuisance, either through ownership or otherwise.

58 Am Jur 2d (2002 Ed.), § 118, pp 645-646, states:

> To be liable for nuisance, it is not necessary for an individual to own the property on which the objectionable condition is maintained, but rather, liability for damages turns on whether the defendant controls the property, either through ownership or otherwise. A person is liable if he or she knowingly permits the creation or maintenance of a nuisance on premises of which he or she has control, even though such person does not own the property, or even though such person is not physically present, such as where he or she is an absentee owner. A party who has no control over the property at the time of the alleged nuisance cannot be held liable therefor.

See also 66 CJS § 75, p 623:

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[1] The lower court denied the motion to amend based on undue delay and because the proposed amendment to plaintiff's complaint "makes it look like babbling pleadings." Although not clear, the comments by the trial court appear to reflect the court's opinion that the amended pleading would be futile. In any event, we will not reverse the lower court when it reaches the right result for the wrong reason. *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 240; 581 NW2d 746 (1998); *Porter v Royal Oak*, 214 Mich App 478, 488; 542 NW2d 905 (1995).

> A party who has no right of possession or control over the property cannot be held liable for nuisance, as he has no ability to create a nuisance or prevent a nuisance from arising on the property. However, one creating nuisance on his premises and then parting with control thereof under circumstances warranting an inference that he authorized the continuance, or profited therefrom, may be held liable for any damage suffered by reason of its continuance thereafter.

In *Stemen v Coffman*, 92 Mich App 595, 598; 285 NW2d 305 (1979), the plaintiff sued the City of Grand Rapids and the city's fire chief and fire inspector alleging that they were liable under a claim of nuisance for their failure to inspect and abate an apartment complex which possessed an inadequate fire protection system. In dismissing the nuisance claim against the governmental defendants, our Court held:

> "*Liability for damage caused by a nuisance turns upon whether the defendant was in control, either through ownership or otherwise*." 58 Am Jur 2d, Nuisances, § 49, p 616. We have found no authority imposing liability for damage caused by a nuisance where the defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance. The city's relationship with the property alleged to constitute a nuisance in this case falls under none of these headings; indeed, it is far more attenuated. To hold the city liable under the "nuisance exception" in this case would stretch the concept of liability for nuisance beyond all recognition. [Emphasis added.]

Later, in *Disappearing Lakes Ass'n v Dep't of Natural Resources*, 121 Mich App 61, 71; 328 NW2d 570 (1982), aff'd *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984),[2] our Court relied on *Stemen v Coffman* to hold that the issuance of a permit to dredge a channel did not create a cause of action in nuisance because the DNR did not control the premises:

> There is no question but that the state granted permits to dredge. They expected channels to be built. It is not alleged and pleaded that the state intended the plaintiffs' lake levels be lowered. It is not alleged and pleaded that the state owned the land, owned the dredging equipment, operated the dredging equipment or in any way controlled the actual dredging except as it exercised the discretionary power to grant or refuse to grant permits to dredge.

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[2] See *Ross, supra* at 657 ("The Court of Appeals conclusion that plaintiffs had insufficiently pleaded a nuisance cause of action is not clearly erroneous. *Plaintiffs essentially asserted only a negligence claim*." [Emphasis added.])

We summarized the holding of *Disappearing Lakes* as follows in *Attorney General v Ankersen*, 148 Mich App 524, 560; 385 NW2d 658 (1986):

> The Court of Appeals in *Disappearing Lakes Ass'n v DNR*, 121 Mich App 61; 328 NW2d 570 (1982), *aff'd Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), held that nuisance liability extends only to the party that *owns* or *controls* the property. It is readily apparent from *Disappearing Lakes* and the cases cited therein that "control" of the property means more than issuing a permit or regulating an activity on the property, as is alleged in the present case. We conclude, as did the Supreme Court in affirming this Court in *Disappearing Lakes*, that counterplaintiffs have essentially asserted only a negligence claim.

Finally, in *Stevens v Drekich*, 178 Mich App 273, 277-278; 443 NW2d 401 (1989), this Court held that the plaintiff did not set forth a viable claim in nuisance against private landowners for an automobile accident involving a tree that was located on their premises but within the public's right of way. Although the defendants were the owners in fee of the property in which the tree was located, it was held that the claim of nuisance against the defendants did not lie due to their lack of control because of the highway easement:

> Plaintiffs argue that Count III of the complaint states a legally adequate claim based on a nuisance theory. Nuisance liability is predicated upon a dangerous, offensive, or hazardous condition in the land or an activity of similar characteristics conducted on the land. *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 636; 178 NW2d 476 (1970). *It requires that the defendant liable for the nuisance have possession or control* of the land. *Attorney General v Ankersen*, 148 Mich App 524, 560; 385 NW2d 658 (1986). Thus, the absence of any right of possession on the part of defendants to the berm area defeats liability predicated upon nuisance theory. [Emphasis added.]

Two cases have been relied on for the proposition that "control can be found where defendant created the nuisance." However, neither *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186; 540 NW2d 297 (1995), nor *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602; 528 NW2d 835 (1995), supports the principle of law advocated by the majority. The cited quotation in *Cloverleaf Car Co* is dicta for the reason that, in that case, our Court held that none of the theories alleged in plaintiff's complaint alleged a viable claim of nuisance, and, therefore, the trial court properly granted summary disposition in defendant's favor. As to the element of control, our Court stated:

> Because a seller in a commercial transaction relinquishes ownership and control of its products when they are sold, *it lacks the legal right to abate* whatever hazards its products may pose. *Gelman Sciences, [Inc v Dow Chemical Co*, 202 Mich App 250; 508 NW2d 142 (1993)], *supra* at 252. Because Phillips had no control over what happened to the gasoline after it was delivered, it cannot

> incur liability as the supplier of the gasoline. [*Cloverleaf, supra* at 192, emphasis added.]

In the second case, *Baker v Waste Management of Michigan, supra,* our Court also affirmed the grant of summary disposition on a claim of nuisance based on lack of control:

> Plaintiffs have not alleged facts that would show that defendants created or were under a statutory obligation to abate the nuisance, controlled the property where the nuisance arose, or employed another to do work that they knew was likely to create a nuisance. Plaintiffs' claim, that defendants could have withheld the delivery of yard waste to the site, is simply insufficient to establish control over the nuisance, particularly in light of their acknowledgment that others could have continued to send yard waste to the facility. In other words, because defendants' withholding of waste would not necessarily have eliminated the nuisance, defendants may not be considered to have had control over the nuisance. [*Baker, supra* at 606-607.]

Finally, *Traver Lakes Community Maintenance Ass'n v Douglas Co,* 224 Mich App 335; 568 NW2d 847 (1997), is clearly distinguishable on the basis that *Traver Lakes* involved "elements of both trespass and a private nuisance," neither of which exists in the present case. *Id*. at 345.

In the instant case, the trial judge noted that this is a premises liability slip and fall case. Unlike *Traver Lakes*, plaintiff's proposed claim does not allege a trespass or a private nuisance. In this regard, "Too often, 'nuisance' terminology is used to mask what are, in fact, simple negligence claims for the purpose of avoiding some effects of calling it what it is, a negligence claim." *Schroeder v Canton Twp,* 145 Mich App 439, 441; 377 NW2d 822 (1985). Here, plaintiff has relabeled a negligence action as a public nuisance claim in the transparent attempt to avoid the "open and obvious" defense. However, a cause of action upon which relief can be granted is not stated against defendant Hyler Construction Company because it lacked control of the premises. Control of the premises at the time of the slip and fall rested exclusively with the property owner, Northwind Investments. At the time of plaintiff's accident, it was Northwind that could have *warned* of the condition, *restricted* access to the area, or *corrected* the alleged defect. Due to its control of the premises, Northwind, not defendant Hyler Construction Company, has the legal right to *abate* the alleged public nuisance. *Cloverleaf, supra*. For these reasons, I would hold that, because the amendment would be futile, the trial court did not abuse its discretion in denying plaintiff's motion to amend the complaint to allege a claim of public nuisance.

I would affirm.

/s/ Richard Allen Griffin